IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

:: J U D G M E N T ::

Dine Khan & Ors. Vs. The State of Rajasthan
D.B. CRIMINAL APPEAL NO. 157/2002

against the judgment dated 01.02.2002 passed by the learned Additional Sessions Judge (Fast Track), Nagaur in Sessions Case No.209/2001 (52/2000).

DATE OF JUDGMENT : 09th May, 2006

P R E S E N T

HON'BLE MR. JUSTICE N.N.MATHUR
HON'BLE MR. JUSTICE MANAK MOHTA

Mr. Sandeep Mehta)
Mr. Vineet Jain) for the appellants.

Mr. Vishnu Kachhawaha, Public Prosecutor.

REPORTABLE

BY THE COURT : (PER HON'BLE MR. MATHUR,J.)

1. The appellants Dine Khan, Panne Khan, Majid Khan and Ramjan Khan all sons of Sultan Khan have been convicted on the charge of murder of Mohd. Yasin for offence under Section 302/34 IPC and each of them have been sentenced to imprisonment for life and to pay a fine of Rs.500/-, in default of

payment of fine to further undergo one months simple imprisonment by the judgment dated 01.02.2002 passed by the learned Additional Sessions Judge (Fast Track), Nagaur.

2. Briefly stated the facts of the case are that PW-2 Mohd. Iqbal lodged a written First Information Report on 27.07.2000 at Police Station Nagaur stating inter alia that in the night at about 11-11:30, a small boy visited his house and informed that his brother Mohd. Yasin was lying in the pool of blood near 'Nakshbando-ki-Maszid', on which, he along with his father, mother and brother rushed to the spot. They found Mohd. Yasin lying injured. On enquiry, he disclosed that appellants Dine Khan, Panne Khan, Ramjan Khan and Majid Khan called him from the house and brought to the place of incident. He also stated that appellant Dine Khan inflicted injury by knife on both the sides of his abdomen, on account of which, he fell down. Thereafter, appellant Panne Khan inflicted injury by 'farsi' on the head. He was being dragged by appellants Majid Khan and Ramjan Khan. Appellant Dine Khan inflicted injuries on various parts of his body. After considering him dead, the accused persons fled away. The injured Mohd. Yasin was taken to the hospital. On this information, police registered a case for offence under Sections 307, 323 IPC and proceeded with the investigation. The injured was medically examined by

PW-5 Dr. Ramvilas Choudhary. He prepared the injury report Ex.P-11. The injured was immediately shifted to the Mahatama Gandhi Hospital at Jodhpur, where, he succumbed to the injuries at about 4 p.m. The post mortem of the dead body was conducted at 7 p.m. by PW-22 Dr. Jagdish Jugtawat. He prepared the Post Mortem Report Ex.P-23 and noticed the following injuries:

1. Stitched incised wound 5½ cm long on Rt. Scapula.
2. Stitched incised wound 2 cm on Rt. side on back of chest lower ½ portion.
3. Stitched incised wound 4 cm long on back of chest on mid line.
4. Bruise 12 cm x 10 cm on Rt. side of abdomen.
5. Stitched lacerated wound 5 cm long on Rt. parietal region.
6. Stitched lacerated wound 3 cm long on Rt. side of fore head.
7. Stitched incised wound 3 cm long on Rt arm L/2 laterally.
8. Stitched incised wound 3 cm long on Lt. side of abdomen outerly.
9. Stitched incised wound 2½ cm long on Lt. side of abdomen 2 cm below & lateral to inj. No. 8.
10. Bruise 12 cm x 6 cm on Lt. iliac fossa.
11. Stitched incised wound 1½ cm long on Lt. side of abdomen lower ½ portion.

12. Stitched incised wound 1½ cm long on Lt. side of chest outero laterally.

13. Stitched incised wound 3 cm long on Lt. side of chest laterally lower ½ portion.

14. Incised wound 3 cm x 1 cm x skin deep on Lt. side of back of abdomen.

In the opinion of the Doctor, the cause of death was shock and hemorrhage due to multiple injuries.

3. After usual investigation, the police laid charge sheet against the appellants for offence under Sections 302, 302/34 IPC. The appellants pleaded not guilty of the charges levelled against them and claimed trial.

4. The prosecution adduced oral and documentary evidence in support of its case. The appellants in their statements under Section 313 CrPC denied the correctness of the prosecution evidence appearing against them. The learned trial court relying on the oral dying declaration made by the deceased before PW-6 Shakawat, PW-14 Guljar Khan, PW-15 Hamida, PW-16 Mohd. Sabir corroborated by the prompt FIR and the medical evidence found the prosecution case proved, as such, convicted and sentenced the appellants in the manner indicated above.

5. Assailing the conviction, it is vehemently argued by the

learned counsel for the appellants that the learned trial court has committed error in recording the conviction of the appellants solely on the basis of the oral dying declaration. Learned counsel has also pointed out serious infirmities in the oral dying declaration. On the other hand, learned Public Prosecutor has supported the judgment of the learned trial court.

6. We have carefully perused the record and gave our anxious consideration to the contentions urged by both the learned counsel. The prosecution in support of its case has examined PW-3 Mohd. Sabir and PW-4 Om Prakash as witnesses of the occurrence. But, both of them did not support the prosecution case, as such, they were declared hostile. Thus, the entire case rests upon the oral dying declaration. The prosecution has sought to prove the dying declaration by the statements of PW-2 Mohd. Iqbal, PW-6 Shakawat, PW-14 Guljar Khan, PW-15 Hamida, PW-16 Mohd. Sabir and PW-7 Mohd. Deen.

7. PW-6 Shakawat is the nephew of deceased-Yasin. He deposed that on the fateful day, at about 11-11:30 p.m., he was sleeping on the terrace of his house at Loharpura near 'Nakshband-Maszid'. He heard distress cries from the side of 'Nakshband-Maszid', which he identified to be of his maternal

uncle Yasin. He immediately rushed to the house of Yasin and informed his family members, which included his mother, father and brothers. Yasin was lying injured in the pool of blood. Yasin disclosed to him that he was being assaulted by appellants namely Dine Khan, Panne Khan, Ramjan Khan and Majid Khan. In the cross examination, he made it clear that hearing the cries, he straightway went to Yasin. He disclosed the names of the assailants to him. PW-2 Mohd. Iqbal is the brother of deceased-Yasin. He stated that on the fateful day, he was sleeping in his house near 'Nakshbando-ki-Maszid'. A small boy namely Shakawat informed him that his brother Mohd. Yasin was lying injured near 'Nakshbando-ki-Maszid'. He along with his father, mother and brother Sabir rushed to the spot. They found Yasin lying injured in the pool of blood. On enquiry, Yasin disclosed that Dine Khan, Majid Khan, Ramjan Khan and Panne Khan, the four brothers called him from the house and all of them made assault on him. Dine Khan and Majid Khan stabbed knife in his abdomen, on account of which, he fell down. After he had fallen, Panne Khan gave a 'farsi' blow on his head. Ramjan Khan caught hold of his legs, dragged and kicked him. The incident took place because of an old enmity. The accused persons have also lived in the same locality. As his condition was deteriorated in the hospital, he was referred to the hospital at Jodhpur. On the next day, Yasin succumbed to the injuries. He also stated

that he lodged a written report Ex.P-3 at the police station, Nagaur. He has given the details of the investigation. There is a lengthy cross examination but nothing substantial has been brought in to discredit the testimony of this witness.

8. PW-14 Gulzar Khan is the father of deceased Yasin. He stated that on the fateful day, at about 11-11:30 p.m., he walked up on a call given by Shakawat. He informed that Yasin was lying injured in the pool of blood near 'Nakshband-Maszid'. He along with PW-16 Mohd. Sabir, PW-2 Mohd. Iqbal and other family members rushed to the spot. At that time, PW-7 Mohd. Deen also arrived in a taxi. They also informed about Yasin lying injured. They reached on the spot and on enquiry, Yasin disclosed that accused persons namely Dine Khan, Majid Khan, Panne Khan and Ramjan Khan fraudulently took him from the house. Dine Khan and Majid Khan inflicted knife injuries on both the sides of his abdomen, on account of which, he fell down. Panne Khan gave a 'farsi' blow on his head. Ramjan Khan dragged and kicked him. Yasin was taken to the hospital in a taxi. PW-2 Mohd. Iqbal went to the police station for lodging the First Information Report. On the advice of the Doctor, Yasin was removed to the hospital at Jodhpur, where he succumbed to the injuries. In the cross examination, he was confronted with his police statement Ex.D-4, wherein, he had only given the names

of Dine Khan and Majid Khan. He stated that he had given the names of all the four accused persons but was not aware as to why the police has recorded the names of only two accused persons. He was also confronted with the omission of not disclosing the name of Mohd. Deen, Sabir and Om Prakash. He also omitted to give statement to the effect that Ramjan Khan caught hold of the legs of Yasin and dragged and kicked him.

9. PW-15 Hamida is the mother of deceased Yasin. Her statement is almost on the line of PW-14 Guljar Khan. She was also confronted with her police statement Ex.D-5. PW-16 Mohd. Sabir is the brother of deceased Yasin. His statement is also on the same line of PW-14 Guljar Khan. In the cross examination, he was confronted with his police statement Ex.D-6. He denied the suggestion that he has given a false statement to falsely implicate the appellants. PW-7 Mohd. Deen has stated that on the fateful day, at about 11-11:30 p.m., he was at the Shankhla Studio. At that time, Sabir arrived in a taxi and informed that Yasin has been belaboured by the appellants Dine Khan, Sultan, Panne Khan and Ramjan by knife and barchi. He went to the spot and witnessed the incident. He also went to the house of Yasin's father in a taxi and informed his parents. After given information, he returned to Yasin. On enquiry, Yasin disclosed that he was assaulted by Dine Khan, Mazid Khan,

Panne Khan and Ramjan Khan. He also stated that Dine Khan inflicted a knife injury so as Mazid Khan and Panne Khan gave a barchi blow on his head. Thereafter, he fell down. Ramjan Khan dragged and kicked him. The injured was taken to the hospital at Nagaur. Thereafter, he was removed to the hospital at Jodhpur. He also stated that there was an old enmity between the parties. He admitted in the cross examination that police recorded his statement after 25-26 days of the incident.

10. Learned counsel has criticized the testimony of the above witnesses of oral dying declaration on number of grounds. It is contended by the learned counsel that deceased was not in a position to make oral dying declaration, as it is evident from the statement of PW-5 Dr. Ramvilas Choudhary, who admitted in his cross examination that looking to the seriousness of the injuries, the injured must have become unconscious immediately. It is also submitted that all the witnesses of oral dying declaration are highly interested witnesses being close relatives of the deceased. As far as the statement of PW-7 Mohd. Deen is concerned, it is submitted that police has recorded his statement after 20-25 days from the date of incident. Thus, he is a cooked up witness. It is also submitted that PW-14 Guljar Khan in his police statement Ex.D-4 has given only the names of Dine Khan and Mazid Khan as assailants, so as PW-15 Hamida in her police

statement Ex.D-5. Thus, the names of Ramjan Khan and Panne Khan have been falsely introduced later on. Lastly, it contended by the learned counsel that the alleged statement made by deceased Yasin before PW-2 Mohd. Iqbal, PW-6 Shakawat, PW-7 Mohd. Deen, PW-14 Guljar Khan, PW-15 Hamida and PW-16 Mohd. Sabir to the effect that appellants had stabbed him, could not be relied upon, as it was hear say. Learned counsel has placed reliance on the decisions of the Hon'ble Apex Court in Sabbita Satyavathi Vs. Bandala Srinivasarao & Others, reported in 2005 SCC (Cri) 585 and Zafar Vs. State of U.P., reported in 2003 SCC (Cri) 730. As far as the last contention raised by the learned counsel is concerned, the same was rejected by the Hon'ble Apex Court in Elkur Jameesu Vs. State of Andhra Pradesh, reported in AIR 1998 Supreme Court 1492, wherein, it was held that the oral statement so made by the deceased is not only admissible as evidence under Section 32(1) of the Evidence Act but can also be made the sole basis for conviction, if it can be safely relied upon. Thus, the legal position of an oral dying declaration is that it should be scrutinized very carefully and if the court is satisfied after such scrutiny, the dying declaration was true and was free from any effort to prompt the deceased to make such a statement and is coherent and consistent, there is no legal impediment in founding the conviction. Thus, bearing in mind, we proceed to scrutinize the evidence of oral dying

declaration as to its truthfulness in the light of the surrounding facts and circumstances of the case. As far as the first criticism to the effect that looking to the seriousness of the injuries, the injured could not be in a position to make statement as admitted by PW-5 Dr. Ramvilas Choudhary is concerned, we find no merit therein. The suggestion admitted by PW-5 Dr. Ramvilas Choudhary is only his opinion. He has not given a firm statement in that regard. The FIR of the incident has been lodged immediately, wherein, the names of the appellants have been given on the basis of the oral statement made by deceased-Yasin. The statement finds corroboration from the medical evidence. There was no reason for the witnesses to falsely implicate the accused appellants. The injured had given a clear and vivid account of the attack. Thus, the oral dying declaration is a ring of truth. PW-2 Mohd. Iqbal, PW-6 Shakawat, PW-14 Guljar Khan, Pw-15 Hamida and PW-16 Mohd. Sabir are the most natural and probable witnesses. In spite of searching and lengthy cross examination, nothing substantial has been elicited to discredit their testimony. When the oral dying declaration is considered along with the medical evidence and the prompt FIR, which contains the substratum of the prosecution case and was lodged with utmost dispatch, the only legitimate inference that can be drawn is that the prosecution has been able to conclusively prove that the appellants

committed the alleged crime. However, we find that the case of appellant Ramjan Khan is distinguishable from the case of the other accused appellants. He has been assigned only a role of dragging and giving a kick. He was not armed with any weapon. On the facts, it cannot be said that he shared a common intention with other accused persons of committing the murder of Yasin. Thus, we are of the view that the learned trial court has committed error in convicting appellant Ramjan Khan for offence under Section 302/34 IPC.

11. Consequently, the appeal is partly allowed. While maintaining the conviction and sentence of the appellants–Dine Khan S/o Sultan Khan, Panne Khan S/o Sultan Khan and Majid Khan S/o Sultan Khan for offence under Section 302/34 IPC for imprisonment of life, the appeal filed by appellant-Ramjan Khan S/o Sultan Khan is allowed. Appellant–Ramjan Khan S/o Sultan Khan is acquitted of the charge under Section 302/34 IPC. The judgment of the learned trial court dated 01.02.2002 is modified to the extent that while confirming the conviction and sentence of the three appellants namely Dine Khan S/o Sultan Khan, Panne Khan S/o Sultan Khan and Majid Khan S/o Sultan Khan, the order of conviction and sentence of appellant-Ramjan Khan S/o Sultan Khan is set aside. Appellants-Dine Khan S/o Sultan Khan, Panne Khan S/o Sultan Khan and Majid Khan S/o Sultan

Khan are in jail. They will serve out the remaining part of the sentence. Appellant–Ramjan Khan S/o Sultan Khan is on bail. His bail bonds stand discharged.

(MANAK MOHTA),J. **(N.N.MATHUR),J.**

ms rathore